* *

In the Matter of Arbitration

between

Regional Transit Service, Incorporated

and

Amalgamated Transit Union, Local 282

Opinion

and

Award

* *

This arbitration was heard on October 26, 2015, at the Company's offices in Rochester, New York. The undersigned was appointed to arbitrate the controversy from a panel maintained by the parties. Upon submission of post-hearing briefs by both sides, the record was closed.

APPEARANCES

For the Employer:

Roy Galewski, Attorney
Janet Snyder, Labor Relations Director
Michael Capadano, Director of RTS Bus Operations

For the Union:

Nolan Lafler, Attorney
Jules Smith, Attorney
Jacques Chapman, President
Dominick Zarcone, Vice President
[redacted] Grievant

THE ISSUE

Did the Employer violate the Collective Bargaining Agreement (CBA) when it calculated the grievant's paid sick leave accrual at a rate of .25 days per month when he became a full-time operator? If so, what shall the remedy be?

BACKGROUND

The facts of this case are not materially in dispute. The grievant, [redacted] began his employment with the Company in 2009 as a Bus Washer. In late 2011, he was offered the position of Part-Time Bus Operator Trainee. He accepted the position and began his training in January 2012, becoming a Part-Time Bus Operator in April 2012. In September 2013, the grievant assumed his current position of Full-Time Bus Operator.

The CBA provides in Section 18(A) that employees with less than three years of seniority receive ¼ day of sick leave per month, and that employees with three or more years of seniority receive ½ day of sick time per month. During his time as a Bus Washer, the grievant accumulated sick time at ¼ day per month, but he had used all the time he had accumulated when he became an operator trainee. While he was an operator trainee and a part-time operator he accumulated no sick time. Upon his promotion to full-time operator he once again began receiving sick time at the rate of ¼ day per month. The time he spent as a full-time Bus Washer was not counted toward the requisite three or more years of seniority to qualify for the ½ day. The grievance claims that the grievant should have started receiving the ½ day once his combined full-time service (including that as a Bus Washer) reached three years. The immediate trigger for the grievance was a denial of sick pay in February 2014 because the grievant had not accumulated enough sick time.

Seniority is addressed in a number of places in the CBA in addition to Section 18(A). Section 22(A) states that "any employee who accepts a position with the Company outside the bargaining unit will lose all bargaining unit seniority." Section

22(D) provides that an employee who transfers from one department to another and remains in the new department for six months forfeits all seniority rights in the old department. Section 54(H) provides that part-time operators do not accrue seniority. The Company's denial of the grievance was based on its view that under these provisions of the contract the grievant did not have enough seniority (and still does not have enough seniority) to qualify for the ½ day.

POSITION OF THE UNION

The Union contends, first of all, that the Company violated the CBA because the accrual rate under Article 18 is based on years of *Company* seniority. The grievant reached the requisite three years of Company seniority on October 9, 2013, and at that point should have been accruing a half-day of sick leave per month. The controlling issue in this case is whether the term "seniority" in Article 18 means company seniority or departmental seniority, and the plain language of the Agreement shows that it is company seniority that matters. Where the parties intended to have decisions made on the basis of departmental seniority, they made that clear in the CBA. Departmental seniority is nowhere referenced in the provisions covering sick leave. Rather, Article 18 specifically states that sick-leave accrual is based on years of seniority *with the Company*. The grievant had accrued three years of seniority with the Company as of October 9, 2013.

The Company's position is not saved by Articles 22 and 54 of the CBA, argues the Union. While the Agreement permits the Company to reset an employee's departmental seniority in certain situations, it does not permit a resetting of Company seniority, which determines service-related benefits like sick leave. Article 22 governs

departmental seniority only, and it does not mandate the forfeiture of pre-existing Company seniority. Section 22(D) provides for a waiver of "all seniority rights in the former department"; thus when the grievant moved from Bus Washer to Bus Operator, after six months he forfeited all seniority rights exercisable within the Maintenance non-Mechanical Department, where the Bus Washer is situated. However, he did not forfeit rights associated with Company seniority, which remained exercisable toward service-related benefits, which are determined by Article 18 and other clauses. Similarly, Article 54 governs departmental seniority only and does not compel the forfeiture of Company seniority. This provision states only that a part-time operator cannot accrue seniority for use as a full-time operator. Section 54(H) does not say, as the Company claims, that an employee forfeits all pre-existing seniority when he becomes a part-time operator. While the grievant properly did not accrue any additional seniority while in a part-time status, he did not lose his existing Company seniority earned as a full-time Bus Washer. By using September 2, 2013, as the grievant's start date for purposes of accruing sick leave, the Company is arbitrarily and artificially resetting his employment relationship.

For all of the foregoing reasons, the Union urges that the grievance be granted and the grievant's sick-leave accrual rate be adjusted as of October 9, 2013.

POSITION OF THE COMPANY

The Company contends that the plain language of the CBA entitled the grievant to only a quarter-day per month of sick leave when he became a full-time operator, and that the Union has not met its burden of proving a contract violation. The language at issue was bargained by the parties and has only one reasonable interpretation. There is no dispute that the grievant accrued almost three years of seniority as a Bus Washer.

Article 18 provides that sick-leave accrual is based on "seniority," *not* general length of service. Section 22(A) of the CBA sates that an employee who accepts a position outside the bargaining unit forfeits *all bargaining-unit seniority*. Company testimony, unrebutted by the Union, established that the Bus Operator Trainee position is a non-union title outside the bargaining unit. Thus when the grievant left his bargaining-unit position to accept a non-unit job, he lost all of his seniority under the contract. Further, while the grievant worked in the unit title of Part-Time Bus Operator, he accrued no seniority. He did not begin accruing seniority until he became a full-time operator in September 2013. When he started in that position he had zero seniority.

The Company argues that the Union here seeks an award that ignores the plain language of the CBA, which bases accrual rates on *seniority*. Although the grievant appears to view "seniority" and "length of service" interchangeably, the contract explicitly bases sick-leave accruals on seniority, not length of service. Thus the accrual rate to which the grievant was entitled until he reaches three years of seniority is one-quarter day per month. Accordingly, the grievance should be denied in its entirety.

FINDINGS AND OPINION

The question to be determined in this arbitration is straightforward. The CBA says that a full-time employee receives a quarter-day of sick time per month of service until he has three years of seniority, at which time he receives a half-day of sick time per month. The question at issue here is how much seniority the grievant had as of October 9, 2013.

There is no dispute that the grievant accumulated seniority during his time as a full-time Bus Washer from 2009 to early 2012. There is no dispute that he did *not*

accumulate seniority during his time as a part-time operator in 2012 and 2013. The question is whether in 2013 he still had the seniority he had accumulated from 2009 to 2012 and then added to the accumulation after he became a full-time operator in September 2013.

Although the point is not specifically addressed in the CBA, it is a reasonable presumption that seniority once earned is retained unless there is a specific reason for its forfeiture. In the present case the Company argues that the grievant actually forfeited the seniority he accrued as a Bus Washer for *three* reasons: he moved from one department to another; he moved from a full-time position to a part-time operator position; and he moved from a bargaining-unit position to a non-unit position. I find, however, that applying the cited contractual provisions to the facts of this case in the way advanced by the Company does not withstand scrutiny.

Section 22(D) says that an employee forfeits "all seniority rights in the former department" six months after a transfer to a new department. In this case, the grievant did transfer to a new department and remained in the new department for more than six months, but here I believe the Union is persuasive when it argues that what Section 22(D) is addressing are those seniority rights applicable to specific departments. Not only does the clause itself refer explicitly to seniority rights *in the former department* (and thus inferentially not rights that are applicable Company-wide), but it follows a paragraph specifying that "separate seniority lists will be maintained" for individual departments. As I read this language, the message is that the employee who simply transfers from one department to another and stays there for six months loses the

seniority rights he had that are specific to the department he moved from, but not rights that are applicable uniformly across the Company.

Section 54(H) provides that part-time operators do not accrue seniority, either during the time that they are part-time operators or retroactively after they become full-time operators. The Company's argument suggest an equivalence between not accruing seniority and losing what has been previously accrued, but in my reading to say that part-time operators do not *accrue* seniority is not the same as saying that they lose whatever seniority they had when they became part-time operators. Here again, seniority is an earned asset, and once earned it is lost only for a specific reason. I see nothing in Section 54(H) to indicate that any previously earned seniority is forfeited *because* an employee has become a part-time operator, although the accrual clearly does not grow during the employee's time as a part-time operator.

Section 22(A), however, does provide a specific reason for losing previously accrued seniority, namely, accepting a position with the Company outside the bargaining unit. The Company argues that the plain language of this clause means that the grievant lost all his seniority when he accepted the position of Part-Time Bus Operator Trainee, which is outside the bargaining unit. The Union does not address Section 22(A) specifically, arguing only that Article 22 as a whole governs departmental seniority exclusively, but this argument is not persuasive. Article 22 is titled generally "Seniority Rights," while the CBA contains a number of other articles that by their specific terms address conditions in named departments. Further, unlike Section 22(D), which talks about departmental rights, 22(A) says that accepting a position outside the bargaining unit results in the loss of *all bargaining unit seniority."* There is nothing in this paragraph

to suggest that an employee who accepts a position in, say, management retains any bargaining-unit seniority at all. Indeed, the parties took care in Section 22(B) to explicitly provide for the retention of "full seniority rights" for employees who take elected or appointed positions with the Union itself. They notably did not do so for people who take non-unit positions with the Company.

The issue thus reduces to whether the grievant in fact accepted a position outside the bargaining unit when he became a Part-Time Bus Operator Trainee in early 2012. The Company notes correctly that the Union offered no evidence to rebut or question the testimony of Labor Relations Director Janet Snyder that this position is outside the bargaining unit, and in fact the claim is not challenged in the Union's argument. But there is a strong element of hyper-technicality in this construction, at least as it applies to the facts of this case. The position that the grievant accepted was not on the office or clerical staff, or cashier, or dispatcher, or supervision, or any of the other specific bargaining-unit exclusions listed in the recognition clause (Article 3) of the CBA. What he accepted was a seven-week stint to train for a position that *is* in fact in the bargaining unit, and it was clearly the expectation of both the grievant and the Company that the trainee position, although technically outside the bargaining unit, was no more than a medium of passage from one bargaining-unit job to another. In a real sense, it can be said that what the grievant "accepted" was a prospective job as a part-time bus operator, although he had to go through a training period to get to it.

Accordingly, the finding here is that while the parties knowingly bargained the loss of accrued seniority for employees who move from a bargaining-unit position to a non-unit position, that bargain did not consciously contemplate non-unit positions that are

actually direct conduits into unit positions. Although the transition was not seamless, what the grievant effectively did under the circumstances present here was move from one unit position to another. Under the very specific facts of this case, then, the grievant was entitled to retain the seniority he accrued as a Bus Washer when he initiated the process of becoming an operator.

AWARD

The Employer violated the Collective Bargaining Agreement when it calculated the grievant's paid sick leave accrual at a rate of .25 days per month when the sum of his time as a Bus Washer and as a Full-Time Bus Operator reached three years. He shall be credited with an additional .25 days of sick time per month retroactive to October 9, 2013. The Arbitrator will retain jurisdiction over this matter for the sole purpose of resolving any dispute that may arise over the implementation of this award.

STATE OF NEW YORK} SS:
COUNTY OF ERIE }

I, Howard G. Foster, do hereby affirm upon my oath as Arbitrator that I am the individual described in and who executed this instrument, which is my award.

December 17, 2015
(dated)

Howard G. Foster
(signature)